**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| EDWARD J. NILAND; JOHN B. GUNN; EMEKA NCHEKWUBE; ERIC KARL SPANGENBERG,<br><br>Plaintiffs - Appellants,<br><br>v.<br><br>CITY OF SAN JOSE, California, a municipal corporation; CALIFORNIA AGRICULTURE AND FOREST PRODUCTS CORP,<br><br>Defendants - Appellees. | No. 02-15352<br><br>D.C. No. CV-00-20902-RMW<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted April 7, 2003
San Francisco, California

Before: FERGUSON, McKEOWN, and RAWLINSON, Circuit Judges.

**1.** Appellants have no standing to proceed in this action as judgment creditors of CalAg because Appellants do not have a judgment against CalAg. *See*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Cal. Civ. Code § 210.780. Appellants' "de facto" creditor argument is not supported by precedent. Appellants do have standing to proceed as assignees.

**2.** Appellants' as-applied claims are not ripe for review because CalAg neither completed an application to develop the property nor applied for a variance. *See Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987). CalAg's failure to complete an application also dooms Appellants' futility argument. *See id.*

**3.** Any facial challenge to the enactments is barred by the statute of limitations.[1] *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993).

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[1] We expressly decline to decide whether California's 90-day statute of limitations governing actions challenging land use decisions or the California one-year statute of limitations applicable to 42 U.S.C. § 1983 claims applies to this case. Even assuming application of the latter, Appellants' claims are still time barred. We also decline to entertain Appellants' contention that their claim arises directly under the Constitution. Because Appellants did not assert this argument before the district court, they have waived it for purposes of this appeal. *See Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002).

**4.** The district court did not abuse its discretion in denying Appellants' Rule 56(f) request because the information sought pertained not at all to the arguments raised in the motion for summary judgment. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 842 (9th Cir. 2002).

**AFFIRMED**.